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IN THE

Supreme Court of the United States

CITY OF LOS ANGELES,
Petitioners,

v.

ALAMEDA BOOKS, INC., a California corporation,
HIGHLAND BOOKS, INC., a California corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF CAPITOL RESOURCE INSTITUTE & CAMPAIGN FOR CALIFORNIA FAMILIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2091 E. Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record
for *Amicus Curiae*

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INTERESTS OF *AMICUS CURIAE*[*]

Capitol Resource Institute ("CRI") is a nonprofit organization that develops positive policies that affect culture and government in the State of California. CRI advocates on issues that affect California's families. They further provide a variety of services and products that educate the public on legislation and governmental policy. CRI provides commentary to more than 30 radio stations in California and offers

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[*] This brief was not authored in whole or in part by counsel for either party. No person or entity, other than the *amicus curiae* or its members, made a monetary contribution to the preparation or submission of this brief. Written consent to the filing of this brief had been granted by counsel for Petitioners and Respondents in this case. Such written consent of all parties has been lodged with the Clerk of this Court.

expert analyses and commentary on key issues of public policy in the State of California.

Campaign for California Families ("CCF") is a nonprofit, nonpartisan family defense and lobbying organization serving families in the State of California and across the nation. CCF promotes the innate worth of all individuals, but advocates against behavioral choices that are detrimental to society, family and the general welfare of the individual states and the nation as a whole.

SUMMARY OF ARGUMENT

Municipalities and adult business owners are mutually entitled to know where the objective bounds of the First Amendment lay. Fortunately, bounds relevant to the present issues have been definitively established by this Court. Homage to the First Amendment gains nothing by requiring that an agency conduct evidentiary studies on negative secondary effects each time it wishes to enforce a regulation against an adult business. Content-neutral regulations can rely on existing data and prior judicial precedent demonstrating or acknowledging the existence of negative secondary effects. To wit, *Renton v. Playtime Theaters, Inc.* (1986) 475 U.S. 41 and *United States v. O'Brien* (1968) 391 U.S. 367 serve as reliable bellwethers for determination of Constitutional soundness in such matters.

Los Angeles Municipal Code § 12.70 is a content-neutral restriction on conduct. Contrary to the position of Alameda Books and Highland Books, the regulations present no significant impact on free expression under the First Amendment. Thus, the only appropriate standard of review for such an ordinance is the standard of review suggested by this Honorable Court in *O'Brien, Id.* Application of the *O'Brien* standard to this case nets only one conclusion. The ordinance withstands constitutional scrutiny.

I. THE LOS ANGELES RESTRICTIONS DO NOT STRIKE A BLOW TO THE FREE MARKET-PLACE OF IDEAS: THUS, A LOWER STANDARD OF REVIEW IS APPROPRIATE

This case does not present with any violation of fundamental rights. The First Amendment is a manifestation of the inherent right of Man to seek truth. It is premised on the notion that, "when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good is better reached by the free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes can be safely carried out." *Abrams v. United States* (1919) 250 U.S. 616, 630 (Holmes, J., dissenting).

"A remark attributed to Voltaire characterizes our zealous adherence to the principle that the government may not tell the citizen what he may or may not say. Referring to a suggestion that the violent overthrow of tyranny might be legitimate, he said: "I disapprove of what you say, but I will defend to the death your right to say it." . . .

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate that inspired Voltaire's immortal comment." *Young v. American Mini Theaters* (1976) 427 U.S. 50, at 63-64.

Importantly, this Court has never stated that there is a First Amendment right to operate adult video viewing booths which a city believes to be in violation of time, place and manner restrictions. Whilst it may be true that the First Amendment graciously affords rights to peaceful assembly

and to express oneself through erotic messages, there is no tenable claim for First Amendment protection in the conduct of viewing of others engaged in sex, on videotape, in a commercial setting. In the view of *amicus curiae*, this Court has recognized that the adult film business may already exist at the outer fringes of the First Amendment.

In *Young v. American Mini Theaters*, *Id.* at 427 U.S. 61, Justice Stevens, writing for a plurality of this Court, stated that, "[t]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . ."

It seems very difficult to believe that the Founding Fathers found themselves in the position of speculating about whether or not video peepshow booths would be in need of the sacrosanct security provided by the Constitution. There is simply no identifiable right to be had in the commercial viewing of pornography within the confines of a business that the government already has a right to impose time, place and manner regulations on.

A. Given the Modern Availability of Pornographic Materials, Adult "Video Arcade" Businesses Have Little or No Protection Under the First Amendment

As recognized in *American Mini Theaters*, *Id.* at 63, "[A]part from the fact that the ordinances treat adult theaters differently from other theaters and the fact that the classification is predicated on the content of the material shown in the respective theaters, the regulation of the place where such films may be exhibited does not offend the First Amendment." Adult video arcades should not be treated differently than adult movie theaters.

It makes no sense to question a municipality's determination that the "bookstore" and "arcade" areas of an

adult business are "separate businesses" for purposes of zoning requirements. This is nothing other than a classification of the physical characteristics of a business. Ultimately, the classification only affects the place in which such a commercial venture may be carried out.

Paris Adult Theatre I v. Slaton (1973) 413 U.S. 49 speaks wisely to the issues at bar. It stands for the proposition that nothing in the body of Constitutional case law seems to suggest that one has a First Amendment right to view pornography in places of public accommodation. As set forth below, the viewing of adult materials can be done in one's home. This truth is even more obvious than it was in 1973.

The proliferation and accessibility of VCRs, camcorders, and a whole host of other technological advances have allowed individuals to partake of the outer fringes of the First Amendment without having to bring what might be rightfully deemed 'indecency' into the public domain. Given the creation of these many alternative avenues of communication, there is no harm in allowing a city to exercise broad control over its land use policies, even if there is an incidental effect on purveyors of pornography.

It only follows that the restrictions and classifications of adult video "arcades" do not rise to the level of an attack on the First Amendment right to "control of reason and the intellect." *Paris* at 93 S.Ct. 2640. While it is true that there is a private right to view and possess pornographic materials, it is not true that one can engage in such conduct wherever and whenever one sees fit. *See generally, Stanley v. Georgia* (1969) 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542.

II. THE DETERMINATION OF "SECONDARY EFFECTS" SHOULD BE A QUESTION OF LAW

Necessarily, this Court defines the boundaries to which fundamental rights may be extended and it is the charge of this Court to declare what the state of law is. *See generally, Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137. To the

extent that this Court, as a final arbiter, may speak to our nation, it is also true that the nation and its cities may rely on preordained conceptions of what constitute acceptable restrictions on rights.

It is undeniable that "[t]he States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger public safety, or to jeopardize the States right to maintain a decent society." *Paris Adult Theatre I v. Slaton* (1973) 413 U.S. 49, 68. It is further acknowledged that, "A commercial theater cannot be equated with a private home." *Id.* at 50.

Implicit in the above statement is the Constitutional inference that a State need not prove to a jury that every act of commercial distribution and exhibition of pornographic materials is offensive to the First Amendment. In fact, in assessing potentially "obscene" materials, this Court found that it was not "error to fail to require "expert" affirmative evidence that the materials were obscene when the materials themselves were actually placed in evidence. [cites]." *Paris* at 56.

Much in the same way that pornographic materials "are sufficient in themselves" for determinations as a matter of law on "obscenity," it makes sense that adult businesses speak for themselves as to the finding of secondary effects. The power to make a neutral judgment regarding the time, place and manner in which such materials can be placed on exhibit is well within the province of the Courts. *Renton* at 475 U.S. 47. Therefore, where a State's determination as to secondary effects relies on "various unprovable assumptions," there is no offense to the Constitution. "Such assumptions underlie much lawful state regulation of commercial and business affairs [cites]." *Paris* at 61-62.

As a matter of States' rights, it is already established that there is an "interest of the public in the quality of life and the

total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself." *Paris* at 58. Indeed, there is a "right of the Nation and of the States to maintain a decent society . . . " *Id.* at 59, citing *Jacobellis v. Ohio* (1964) 378 U.S. 184, 199 (Warren, dissenting opinion). Accordingly, "[i]t is not for [this Court] to resolve empirical uncertainties underlying state legislation, save in the exceptional case where the legislation plainly impinges upon rights protected by the Constitution itself." *Paris* at 60, *citing*, *Ginsberg v. New York* (1968) 390 U.S. 629, 642-643.

III. LOS ANGELES' ZONING RESTRICTIONS ARE PERMISSIBLE CONTENT-NEUTRAL REGULATIONS ON CONDUCT

The opinion of the Ninth Circuit suggests that the "multiple-use" classification gives rise to an additional need for the State's production of evidence of "negative secondary effects." It is implicitly suggested that *Renton* cannot be applied to multiple-use adult businesses since they are of a different breed than a single-use business like a topless club or stand-alone bookstore.

Renton has not outlived its usefulness. Indeed, it is especially helpful in analyzing a regulation against multiple-use adult businesses. *Renton* upheld the principle that "[S]o-called "content-neutral time, place and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. [cites]." *Renton* at 475 U.S. 47.

In addressing the location of adult businesses, this Court has stated, "we have no doubt that the municipality may control the location of theaters as well as the location of other commercial establishments, either by confining them to certain specified commercial zones or by requiring that they

be dispersed throughout the city. The mere fact that the commercial exploitation of material protected by the First Amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young v. American Mini Theaters* (1976) 427 U.S. 50 at 62.

A. Los Angeles' "Multiple-Usage" Distinction is Reasonable and Neutral.

This Court has already stated that, "In our view, the First Amendment requires that Renton refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city, and the ordinance before us easily meets this requirement." *Renton* at 475 U.S. 54. Los Angeles' adult bookstores and arcades cannot show that they are somehow deprived of the right to do business in the City of Los Angeles.

In order to regulate the time, place or manner of expression, a State must show the following: a.) That the city is within its broad power to regulate health and safety; b.) An important government interest is being furthered by the regulation; c.) The government interest is unrelated to the suppression of free expression; and, d.) The restriction is no greater than is essential to further the government interest. *Erie v. Pap's A.M.* (2000) 120 S.Ct. 1382 at 1394, *citing Renton, American Mini Theaters, Barnes,* and *National Citizens Comm. For Broadcasting.*

Here, the "multiple-usage" distinction is nothing other than a reasonable restriction placed on the "manner" in which business may be conducted. The distinction only speaks to the physical arrangement of a business, its manual operations and the conduct engaged in by patrons. Los Angeles could not be much more blatant in its attempts to regulate only "time, place and manner."

As in *Renton* and *American Mini Theaters*, the Los Angeles ordinance admittedly treats adult businesses differently from other types of businesses. In addressing such "discrimination," this Court acknowledged that the City of Renton had relied on evidence that related only to the potential negative effects caused by one adult business. Nevertheless, it was recognized that Renton was entitled to rely on the experiences of Seattle and other cities in making the finding of negative secondary effects. *Amicus Curiae* assert that the same rule of law should apply here.

B. Reliance on 20-Year-Old Studies is Reasonable

Here, the Ninth Circuit intimates that state agency's reliance on old studies is insufficient to meet the charge of the First Amendment. To the contrary, *Renton* specifically states that, "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence the city relies upon is reasonably believed to be relevant to the problem the city addresses . . . We find no constitutional defect in the method chosen by Renton to further its substantial interests." *Renton* at 475 U.S. 51.

While Alameda Books may place defensive reliance on *FW/PBS, Inc., v. Dallas* (1990) 493 U.S. 215, 225-226, the Los Angeles ordinance places no prior restraint on anyone's ability to express themselves through erotic messages in the City of Los Angeles. Presumably, one can find whatever messages are to be found in the public display of sexuality through local dance clubs, adult videos, adult magazines, various adult phone services, the Internet and a whole host of other sources that are readily available for free or otherwise. The availability of alternative avenues for receiving erotic messages is obvious.

The "arcade" portion of an adult business is distinguishable from a "bookstore" area (which could be loosely viewed as a clearing house for constitutionally protected speech). There are alternative avenues of communication for the viewing of

video pornography. The customer can simply go home and enjoy the gild of the constitution through private viewing of the same material otherwise provided by the multiple-use adult business.

C. Reliance on Existing Case Law to Support Restrictions is Reasonable.

Prior to *Renton*, this Court stated that, "The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data." *Paris Adult Theater I* at 413 U.S. 49, 63.

If the holdings of *Renton* and *Paris* can be judicially noticed by a trial court, it is senseless to force a city to go beyond judicial precedent, even if the regulation targets adult businesses only. The foundational stability provided by adherence to stare decisis should not be shaken by those interests residing at the fringes of the Constitution. It is also offensive to the concept of Separation of Powers that any court should be able to summarily supplant the judgment of a legislative body duly empowered to make decisions about the quality of life for its citizens.

This Court has recently stated that, "If States are able to regulate secondary effects, then . . . *de minimis* intrusions on expression cannot be sufficient to render the ordinance content based." *Erie v. Pap's A.M.*, *Id.* at 120 S.Ct. 1394-1395. Where the effects of regulation are directed to "secondary effects" and only incidentally affect expression, the *O'Brien* test applies. *Id.*

The method chosen by Los Angeles is identical, in all respects, to that chosen by the City of Renton. Certainly it

cannot be argued that Los Angeles' regulation is any more intrusive on free expression than the ban on public nudity in *Erie v. Pap's A.M.*

Given that this Court has already ruled on identical factual and legal concepts, Los Angeles, and any other municipality, should be able to reasonably rely on existing law. Were one to adopt the reasoning of Respondents, all municipalities would be forced to undergo and finance individualized studies to determine negative secondary effects. The boundaries of the First Amendment should not fall prey to unnecessary subjectivity.

Indeed, adult businesses could configure and reconfigure their business *ad infinitum* to trigger a need for "new" evidence relevant to the city's existing right to combat recognized societal problems. All the while, the essential content, entitled to some First Amendment protections, would not change. The First Amendment was not intended to be transfigured by means only connected to how one's business is physically arranged or by virtue of varying building facades.

One would not suppose that Respondents were against the idea that a city can place reasonable limits on the number of people in a building, hours of business operation, or other such restrictions. If one can admit of this reality, then it is very difficult to conceive of any offenses against the First Amendment by identifying video booths and bookstores as "separate" businesses for purposes of legitimate restrictions.

IV. THE NINTH CIRCUIT'S ADOPTION OF THE *COLACURCIO* STANDARD IS UNSOUND

The lower court created its own criterion for passing on the constitutionality of time, place and manner restrictions with its standard as set forth in *Colacurcio v. City of Kent* (9th.Cir.1999) 163 F.3d 545, at 551. The standard specifically incorporates language requiring that a city narrowly

tailor any restrictions to serve a significant government interest.

Neither *Renton*, nor any other opinion of this court, requires this high of a level of scrutiny. Had the lower court applied the *Renton* test to the Los Angeles ordinance, they would have come to a proper constitutional conclusion. Any deviation from the spirit of *Renton* creates an unnecessary quagmire of constitutional uncertainty.

CONCLUSION

For the foregoing reasons, the Honorable Court should reverse the judgment of the Ninth Circuit Court of Appeals herein.

Respectfully Submitted,

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2091 E. Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record
for *Amicus Curiae*